Supreme Court, U.S.
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No. 03-321

In The Supreme Court of the United States

JAMES J. TRAVERS,

Petitioner,

v.

VERNON JONES, Individually and in his Official Capacity as Chief Executive Officer of DeKalb County, Georgia; and SCOTT B. WILDER, Individually and in his Official Capacity as Fire Chief of DeKalb County, Georgia,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. Should this Court grant certiorari to consider Petitioner's claim that the Court of Appeals failed to follow binding Georgia precedent where the Petitioner failed to raise before the Eleventh Circuit Court of Appeals the issue of whether the case law relied upon by the Respondent was binding precedent?

II. Did the Eleventh Circuit Court of Appeals correctly apply *University of Tennessee v. Elliot*, 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986) in denying Petitioner's request to relitigate in federal court facts previously presented and determined at a state administrative hearing?

LIST OF PARTIES

The names of the parties listed in Travers' Petition for a Writ of Certiorari are incorrect to the extent that they reference official capacity claims against Vernon Jones and Scott B. Wilder. Official capacity claims against both of these individuals were dismissed by the District Court on their Motion for Summary Judgment. (Petitioner's App. D, 25a).

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STATEMENT OF THE CASE

The Petitioner James J. Travers (hereinafter "Travers"), is a firefighter employed by DeKalb County, Georgia. The underlying issue in this case is the propriety of a thirty-day suspension issued to Travers, and his claims for back pay and attorney's fees therefor. Travers is a member of the International Association of Firefighters, ("IAAF") Local 1492 and serves as a Trustee. In March 2001, DeKalb County firefighters began a picket at the Manuel Maloof Administration Building, the County's administrative offices in Decatur, Georgia, in connection with alleged pay disparity arising from the implementation of a pay study. (Petitioner's App. D, 12a).

On May 14, 2001, Travers was picketing outside of the Manuel Maloof Building on the sidewalk. (Petitioner's App. D, 12a). In addition to Travers, there were other people picketing in connection with separate concerns about a county ordinance. (Petitioner's App. D, 13a). Respondent Vernon Jones, Chief Executive Officer of DeKalb County, Georgia (hereinafter "Jones"), was walking a short distance from one county administration building to another. (Petitioner's App. D, 13a). Travers loudly chanted Jones' name shouting "Vernon, Vernon." (Petitioner's App. E, 27a). Jones and at least two other county employees who heard the name-calling, Morris Williams and Thomas Black, perceived it as taunting Jones. (Petitioner's App. E, 27a). Jones went over to where Travers was standing and told him that he, Travers, was being insubordinate. (Petitioner's App. D, 13a-14a). During the course of that brief encounter, Travers said that he needed to take off his sunglasses so that he could look into Jones' eyes. (Petitioner's App. A, 4a, Petitioner's App. D, 14a, App. E, 27a). Both Jones and Morris Williams, the

Assistant County Administrator who was standing in close proximity to Travers and Jones at the time of the incident, perceived the manner in which Travers removed his glasses in a negative light. (Petitioner's App. D, 14a).

At all material times, Respondent Chief Scott B. Wilder (hereinafter "Chief Wilder") was the Acting Director of the DeKalb County Fire and Rescue Services Department. He was the head of the department and was authorized to impose discipline pursuant to the county's personnel code (subject to civil service appeal), Code of DeKalb County, § 20-190. (*See* Petitioner's App. G). Subsequent to Travers' encounter with Jones, Chief Wilder met with Travers on or about May 16, 2001 to discuss the incident. (Petitioner's App. D, 14a). Thereafter, Chief Wilder wrote to notify Travers of proposed discipline against him and the reasons for taking such action. Specifically, the letter stated that Travers would be suspended for thirty (30) days because of Travers' "insubordination" and "conduct unbecoming-on/off duty." Travers was advised of his right to appear before Chief Wilder to respond, his right of appeal and his right to a hearing before a merit system (civil service) hearing officer. (Petitioner's App. D, 14a). The charges against Travers were based on his conduct towards Jones on May 14, 2001. (Petitioner's App. D, 14a). The County has never disciplined any other individual or proposed discipline against anyone for any conduct or actions that occurred during any picketing or protests. (Petitioner's App. A, 2a).

On June 29, 2001, Travers initiated this civil rights action in the United States District Court for the Northern District of Georgia against DeKalb County, Jones in his individual and official capacities, and Chief Wilder in his

individual and official capacities pursuant to 42 U.S.C. § 1983 and state law. Travers alleges in his Complaint that he was disciplined because he engaged in union activity and that such discipline was retaliatory and violated his rights under the First Amendment of the United States Constitution and under Article I, Section I, Paragraph 5 of the Constitution of the State of Georgia. (Petitioner's App. D, 15a and 16a).

Simultaneously with initiating the present litigation in District Court, Travers appealed his discipline to a merit system hearing officer. (Petitioner's App. D., 15a). Travers' hearing before the merit system hearing officer was conducted in accordance with the Code of DeKalb County, Appendix B, § 1055 and the administrative procedures provided for therein. (*See* Petitioner's Appendices F and G). The hearing officer has the power to reverse a disciplinary action if he or she finds that the discipline was motivated by a non-job-related factor or that the decision to discipline was based on an error in fact. (Petitioner's App. D, 15a). At his merit system appeal hearing, Travers was represented by counsel.[1] (Petitioner's App. A, 4a). The merit system hearing officer heard Travers' appeal and subsequently issued a decision denying the appeal and upholding Chief Wilder's decision to suspend Travers. (Petitioner's App. A, 4a). The hearing officer found, as expressed in his written decision, that Travers had repeatedly chanted Jones' first name "in a loudly, menacingly and taunting manner." The hearing officer

[1] Travers has been represented by his lead counsel in this appeal since the initiation of this litigation and was represented by lead counsel's associate at the hearing before the hearing officer.

further stated that his findings did not indicate any non-job-related factor or any errors of fact that would reverse the department's decision to suspend Travers. (Petitioner's App. E, 26a-28a). Travers did not appeal the hearing officer's decision to state court.

Jones, Chief Wilder, and DeKalb County[2] filed a Motion for Summary Judgment before the District Court below. (Petitioner's App. D, 17a). Jones and Chief Wilder asserted qualified immunity as one of their defenses to the individual capacity claims against them. The District Court granted summary judgment with respect to the County, Jones, and Chief Wilder for all of the state constitutional claims and for the federal constitutional claims against Jones and Chief Wilder in their official capacities. (Petitioner's App. D, 18a). The District Court denied summary judgment to the County, and to Jones and Chief Wilder in their individual capacities, with respect to the federal constitutional claims. (Petitioner's App. D, 23a-24a). Jones and Chief Wilder filed an interlocutory appeal with the Eleventh Circuit Court of Appeals with respect to the denial of qualified immunity. The Court of Appeals accepted interlocutory jurisdiction pursuant to *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S.Ct. 2806, 2816, 86 L.Ed.2d 411 (1985). Travers initially sought to have the appeal dismissed on jurisdictional grounds, but the Eleventh Circuit Court of Appeals denied Travers' Motion to

[2] The action against the County remains, pending the outcome of this Petition.

Dismiss.[3] The Eleventh Circuit reversed the District Court's denial of summary judgment and granted qualified immunity to Jones and Chief Wilder.

Travers' Statement of The Case contains a number of factual misstatements that Jones and Chief Wilder must bring to the Court's attention. Most significantly, Travers indicates that the issue of fact preclusion was not properly before the Eleventh Circuit. Specifically, Travers misstates the facts by characterizing the Court as having reached the issue *sua sponte*. (Petitioner's Brief, p. 8). The following discussion illustrates the fallacy of that statement.

The Eleventh Circuit invoked the doctrine of fact preclusion in direct response to argument from Jones and Chief Wilder. It was not *sua sponte*. The Eleventh Circuit first set out the facts in its order and identified, as had the District Court before it, that the merits of the case ultimately turned on whether the plaintiff's or defendant's version of the facts were correct. (Petitioner's App. A, 3a). The Eleventh Circuit next took the proper course and held that the application of the doctrine of fact preclusion in this case dictated the version of facts that must be considered in deciding the issue of qualified immunity. The Eleventh Circuit acknowledged that there was no dispute as to whether Jones and Chief Wilder were acting within their discretionary authority. The Eleventh Circuit began its analysis with the determination that Travers had the

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[3] Petitioner's principal appellate Brief focused heavily on his argument that the Eleventh Circuit did not have interlocutory jurisdiction.

burden to show that qualified immunity was inappropriate. (Petitioner's App. A, 3a) (citing *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002)). Travers had to allege facts to show that the government official's conduct violated a clearly established constitutional right. (Petitioner's App. A, 3a). The Eleventh Circuit recognized that there is clearly established law which prohibited an employer from demoting or discharging a public employee for engaging in protected speech (citing to *Rankin v. McPherson*, 483 U.S. 378, 383, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987). However, the Eleventh Circuit also cited to its own circuit case law for the proposition that the First Amendment does not require a public employer to tolerate insubordination (citing *Morris v. Crow*, 117 F.3d 449, 458 (11th Cir. 1997)).

Applying the principle set forth in *Rankin* to Travers' version of the facts, the Eleventh Circuit stated that Travers' speech was protected. The Eleventh Circuit also recognized that under Jones and Chief Wilder's version of facts, Travers was insubordinate and engaged in conduct unbecoming. The Eleventh Circuit stated the general proposition that qualified immunity must be denied when there are issues of fact because courts must view the facts in the light most favorable to the plaintiff, but in invoking the doctrine of fact preclusion, the Eleventh Circuit held that fact preclusion resolved all issues of fact between the parties. (Petitioner's App. A, 4a). Based on the now-undisputed facts, the Eleventh Circuit held that Jones and Chief Wilder did not engage in any unconstitutional conduct. Jones, Chief Wilder and DeKalb County have raised the doctrine of fact preclusion in every substantial brief filed at every stage of this litigation, beginning with the filing of their Motion for Summary Judgment in the

District Court. (Petitioner's App. A, 18a). Fact preclusion was set forth as the first issue in Jones' and Wilder's initial appellate Brief to the Eleventh Circuit.[4] Travers' assertion that the Eleventh Circuit's review of the District Court's refusal to give preclusive effect to the administrative hearing officer's findings was *sua sponte* is, at a minimum, plainly erroneous or, at worst, disingenuous. As illustrated herein, Travers misstates the facts by mischaracterizing the manner in which the Eleventh Circuit reached the issue of fact preclusion. It was part of the core legal issues to be addressed in considering qualified immunity.

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[4] Travers did not squarely address the fact preclusion argument in his initial brief to the Eleventh Circuit, but rather spent much of his briefing pursuing the argument that the Eleventh Circuit did not have interlocutory jurisdiction of the appeal. While Jones and Chief Wilder relied on *Jordan v. Board of Pub. Safety*, 253 Ga. App. 339, 559 S.E.2d 94 (2002) and *Blackwell v. Georgia Real Estate Commission*, 205 Ga. App. 233, 421 S.E.2d 716 (1992) from the inception, Travers did not initially argue to the Eleventh Circuit that *Flournoy v. Akridge*, 198 Ga. App. 86, 400 S.E.2d 649 (1990) (as opposed to *Jordan*) was the applicable Georgia law to be considered in deciding whether fact finding by the merit system hearing officer should be given preclusive effect in a § 1983 case. Jones and Chief Wilder contend that Travers has waived his right to argue that *Flournoy* is the applicable Georgia precedent. This argument is addressed more fully herein.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD DECLINE TO GRANT REVIEW TO CONSIDER TRAVERS' CLAIM THAT THE ELEVENTH CIRCUIT FAILED TO FOLLOW BINDING PRECEDENT BECAUSE TRAVERS DID NOT INITIALLY RAISE BEFORE THE ELEVENTH CIRCUIT THE ISSUE OF WHETHER THE CASE LAW RELIED UPON BY THE RESPONDENT WAS BINDING GEORGIA PRECEDENT.

Travers asks this Court to grant certiorari to review his contention that the Eleventh Circuit Court of Appeals failed to follow binding Georgia precedent in determining the fact preclusive effect of an unreviewed administrative hearing. Travers contends that *Flournoy v. Akridge*, 198 Ga. App. 86, 400 S.E.2d 649 (1990) is binding Georgia law concerning fact preclusion and that the Court of Appeals reliance on *Jordan v. Board of Public Safety*, 253 Ga. App. 339, 559 S.E.2d 94 (2002); and *Blackwell v. Georgia Real Estate Commission*, 205 Ga. App. 233, 421 S.E.2d 716 (1992) was misplaced because neither of the cases are binding precedent.

In so arguing, Travers' makes an argument to this Court in pursuit of review of the Eleventh Circuit's decision that he did not make before the Eleventh Circuit. Jones and Chief Wilder made the tact preclusion argument the cornerstone of their defenses of this action.[5] Jones and

[5] Jones, Chief Wilder, and DeKalb County have also contended in the alternative throughout the course of this litigation that they are entitled to summary judgment even absent the doctrine of fact preclusion.

Chief Wilder have relied on *Jordan*, *supra* and *Blackwell*, *supra* from the inception of their pursuit of qualified immunity. Jones and Chief Wilder first raised the fact preclusion argument in their Motion for Summary Judgment and addressed it thereafter through the Court of Appeals. Travers raised *Flournoy* in his Brief in Opposition to Jones and Chief Wilder's Motion for Summary Judgment in District Court, to which Jones, Chief Wilder and the County made a reply. However, while Jones and Chief Wilder made a cursory discussion of *Flournoy* in their principal appellate brief in anticipation of that issue being raised by Travers in his appellate brief to the Eleventh Circuit, that expectation did not materialize. In response to Jones and Chief Wilder's principal brief to the Eleventh Circuit, Travers did not raise the argument that *Jordan* and *Blackwell* were not applicable precedent and that *Flournoy* was the applicable binding present.[6]

A prevailing party may urge any ground in support of the judgment, whether or not that ground was relied upon or even considered by the court below. *See e.g. United States v. New Telephone Co.*, 434 U.S. 159, 166 n. 8, 98 S.Ct. 364, 369 n. 8, 54 L.Ed.2d 372 (1977); *Dandridge v. Williams*, 397 U.S. 471, 475-476, n. 6, 90 S.Ct. 1153, 1156-1157, n. 6, 25 L.Ed.2d 491 (1970). However, as a general rule, this Court "will not consider a claim that was not presented to the courts below." *Jenkins v. Anderson*, 447 U.S. 231, 234 n. 1 (1980). This Court has maintained firm

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[6] Petitioner raised the issue for the first time on appeal in his Petition for Rehearing and Rehearing En Banc. (Resp. App. A, 12 n. 1). Petitioner was forthright in his admission that he had failed to cite *Flournoy* in his initial brief to the Court.

adherence to this rule. *TRW, Inc. v. Andrews*, 534 U.S. 19, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) is a very recent example of the application of this rule.

In *TRW, Inc.*, the respondent, a consumer, sued a credit reporting agency for damages and injunctive relief alleging that the agency violated the Fair Credit Reporting Act ("FCRA") and California law by furnishing her credit reports to requesting companies in connection with credit application by impostors and failing to maintain reasonable procedures to ensure the accuracy of reports. The consumer presented for the first time before this Court an alternative argument regarding the meaning of the statute of limitations set forth in Section 1681 of the FCRA. *TRW, Inc.*, 534 U.S. at 33. In declining to consider the argument, this Court, with minimal explanation or analysis, stated, "[W]e do not reach this issue because it was not raised or briefed below." Similarly, Travers did not advance his "*Flournoy* is the law in Georgia" argument in the Eleventh Circuit until his Amended Petition for Rehearing. The issue that is now presented to this Court should have been presented to the Eleventh Circuit in its initial consideration of the case.

In *United States v. Martinez*, 96 F.3d 473 (11th Cir. 1996), *cert. denied*, *Martinez v. United States*, 519 U.S. 1133, 117 S.Ct. 998, 136 L.Ed.2d 877 (1997), the Eleventh Circuit opined that it does not consider issues or arguments raised for the first time on petition for rehearing. *United States v. Richards,* 646 F.2d 962, 963 (5th Cir. 1981) ("[A]bsent exceptional circumstances we do not consider issues that are first presented in an application

for rehearing"); *United States v. Sutherland*, 428 F.2d 1152, 1158 (5th Cir. 1970).[7] *See* also *Dunkins v. Thigpen*, 854 F.2d 394, 399 n. 9 (11th Cir.) (on a petition for rehearing the court declined to consider an argument not previously raised on appeal).

In the case at bar, although the Eleventh Circuit did not issue an opinion in its denial of Travers' Amended Petition for Rehearing, the above cited case law indicates that the Eleventh Circuit could have properly determined that it could not entertain Travers' argument regarding *Flournoy*. As a consequence of Travers' failure to initially brief this issue to the Eleventh Circuit, this Court lacks the benefit of the views of the lower court. Accordingly, Travers' argument should not be considered here. Because Travers essentially failed to raise this argument in the lower appellate court by failing to raise it in response to Jones and Chief Wilder's principal appellate Brief, this Court should deny the instant Petition for Certiorari.

In addition, the Federal Rules of Appellate Procedure, Rule 28(b) expressly invite and encourage an appellee to include a statement of the issues if the appellee is dissatisfied with the appellant's statement of the issues. Travers submitted a statement of the issues, but he did not raise therein the issue of *Flournoy* being the applicable binding precedent. That Travers failed to avail himself of that opportunity should not be the basis of this Court now

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[7] In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

granting him the extraordinary relief that the grant of a Petition for Certiorari to this Court constitutes.

Finally, the Rules of this Court provide that "a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 12. Travers concedes that *University of Tennessee v. Elliot*, 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986) required the Eleventh Circuit to examine state law in deciding whether to give a state officer's decision preclusive effect with respect to the factual findings in § 1983 litigation. (Petitioner's Brief, p. 11). The Eleventh Circuit followed Georgia law by applying *Jordan* and *Blackwell*, but Travers contends that the Eleventh Circuit did not follow the **correct** binding Georgia law. Essentially, Travers argues that this Court's properly stated rule in *Elliot* was misapplied as a consequence of the Eleventh Circuit's reliance on *Jordan* and *Blackwell* as opposed to *Flournoy*.[8] Under the stated policy of this Court in its Rules, this is precisely the kind of case for which certiorari should not be granted.

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[8] Jones and Chief Wilder do not concede that *Flournoy* is the binding Georgia precedent that the Eleventh Circuit should have applied in determining the state of the law in Georgia concerning fact preclusion. If this Court grants Travers' Petition, Jones and Chief Wilder will demonstrate that both *Jordan* and *Blackwell* are more recent Georgia decisions concerning fact preclusion and that these decisions were correctly applied in the case at bar. In addition, although *Jordan* and *Blackwell* appear to conflict with *Flournoy's* apparent holding that fact preclusion does not apply in § 1983 claims, if this Court grants Travers' Petition, Jones and Chief Wilder will demonstrate that *Flournoy* was, at best, decided on its facts or is, at worst, an anomaly.

II. THE ELEVENTH CIRCUIT'S APPLICATION OF *UNIVERSITY OF TENNESSEE V. ELLIOT* TO THE FACTS OF THE CASE AT BAR IS NOT A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF PROCEEDINGS.

In his desperation to have this Court re-examine the facts of the case at bar, Travers erroneously attempts to cast the Eleventh Circuit's order as "effectively [barring] access to the federal courts [for] all public employees in Georgia who pursue administrative remedies offered by their employers." (Petitioner's Brief, pp. 8-9). As stated above, Travers arrives at this drastic conclusion by contending that the Eleventh Circuit ignored binding Georgia precedent and wrongly extended this Court's decision in *Elliot, supra*. As argued more fully below, the Eleventh Circuit's application of *Elliot* to the facts in the case at bar is consistent both with *Elliot's* holding and how *Elliot* has been applied in every federal district. Therefore, Jones and Chief Wilder request that this Court deny Travers' Writ and affirm the decision of the Eleventh Circuit.

In the case at bar, the Eleventh Circuit reversed the District Court and held that Travers had a full and fair opportunity to litigate the facts surrounding his confrontation with Jones at his administrative hearing. The Eleventh Circuit cited *Elliot* for the proposition that federal courts must give a state agency's findings of fact the same preclusive effect as that entitled in state courts as long as the state agency is acting in a judicial capacity and resolving disputed issues of fact properly before it. The Eleventh Circuit properly found that, under Georgia law, "once an administrative body rules on questions of fact, the questions of fact are thereafter precluded from litigation."

Travers v. Jones, 323 F.3d 1294, 1296 (11th Cir. 2003) *citing Jordan, supra*; *Blackwell, supra*.[9]

A review of circuit decisions dating from 1986 to the present reveals that every federal judicial circuit applies *Elliot* in the same manner as was applied by the Eleventh Circuit in the case at bar. *See Bath Iron Works Corp. v. Director, Office of Workers' Comp. Programs, U.S. Dept. of Labor*, 125 F.3d 18 (1st Cir. 1997) (State law's treatment of agency findings as proper basis for precluding relitigation supports collateral estoppel effect to prior workers' compensation proceedings); *Pappas v. Guiliani*, 118 F.Supp.2d 433 (2nd Cir. 2000) (State law mechanism of issue preclusion also applies to unreviewed state agency fact determinations in § 1983 civil rights actions); *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc.*, 159 F.3d 129 (3rd Cir. 1998) (Litigation under Public Utility Regulatory Policies Act not exempt from state law rules of preclusion in subsequent litigation); *Layne v. Campbell County Dept. of Social Services*, 939 F.2d 217 (4th Cir. 1991) (Federal court did not have authority to review factfinding of administrative panel since state court would be precluded from doing so); *Frazier v. King*, 873 F.2d 820 (5th Cir. 1989) (State law did not recognize doctrine of collateral estoppel therefore plaintiff was not precluded from bringing § 1983 suit, but facts of fully litigated case were binding on parties); *Featherstone v. Columbus Public Schools*, 39 F.Supp.2d 1020 (S.D. Ohio 1999) (State law prohibited plaintiff a second chance to

[9] As argued above, Petitioner's failure to raise his argument that Georgia law does not allow fact preclusion in § 1983 cases in the lower court bars him from raising this argument before this Court.

relitigate facts surrounding his termination, therefore federal court was required to give the same preclusive effect to factual determinations of state administrative hearing); *Brown v. J.J. Case Co.*, 813 F.2d 848 (7th Cir. 1987) (State law of res judicata prevented plaintiff from relitigating claim of discrimination in federal court); *Yancy v. McDevitt*, 802 F.2d 1025 (8th Cir. 1986) (State law of issue preclusion prevented plaintiff from relitigating facts in decision of administrative agency); *Eilrich v. Remas*, 839 F.2d 630 (9th Cir. 1988) (Plaintiff's full and fair opportunity to litigate factual circumstances in administrative hearing prevented him from relitigating the same facts in federal court); *Long v. Laramie County Comm. College District*, 840 F.2d 743 (10th Cir. 1988) (State law of collateral estoppel prevented plaintiff from relitigating findings of fact found by Board of Trustees). Travers' mischaracterization of the Eleventh Circuit's ruling as "barring access to federal courts" is totally unsupported by law or fact and is an argument expressly discussed and rejected by this Court in *Elliot*.

In *Elliot*, this Court analyzed and balanced the presumptive effect to be given the judgments and records of state courts against the investigatory process and procedures of 42 U.S.C. § 2000e-5 and Title VII. This Court cited *Chandler v. Roudebush*, 425 U.S. 840, 96 S.Ct. 1949, 48 L.Ed.2d 416 (1976) as "strong support" that Congress intended government employees to have a trial *de novo* in federal court on Title VII claims. This Court reiterated that "the legislative history of the 1972 amendments reinforces the plain meaning of the statute and confirms that Congress intended to accord federal employees the same right to a trial *de novo* [following administrative proceedings] as is enjoyed by private-sector employees

and employees of state governments and political subdivisions under the amended Civil Rights Act of 1964." *Elliot*, 478 U.S. at 796, 106 S.Ct. at 3224 *citing Chandler*, 425 U.S. at 848, 96 S.Ct. at 1953. Not content to end its inquiry there, this Court also examined its own precedent and held that "nothing in the language of § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U.S.C. § 1738 . . . Moreover, the legislative history of § 1983 does not in any clear way suggest that Congress intended to repeal or restrict the traditional doctrines of preclusion." *Allen v. McCurry*, 449 U.S. 90, 97-98, 101 S.Ct. 411, 416, 66 L.Ed.2d 308 (1980). Travers' desired interpretation of *Elliot* would achieve exactly what this Court specifically rejected, namely, the repeal of common law rules of preclusion. Jones and Chief Wilder respectfully request that this Court reject Travers' invitation to overturn *Elliot*.

III. TRAVERS MADE VARIOUS MISSTATEMENTS OF FACT IN THIS CASE.

Travers has made various misstatements of fact in this case that the rules of this Court require Jones and Chief Wilder to address. Sup. Ct. R. 15(2). In addition to the misstatement of facts referenced in Travers' Statement of Facts, Travers makes a sinister assertion that "Jones did not soon forget Local 1492's support of one of his opponents." (Petitioner's Brief, p. 3). That assertion of fact is unsupported by any reference to the record of evidence before the trial court. It is intended solely for the purpose of adding a negative gloss to the facts of the case in the face of looming defeat and the termination of this litigation that the denial of Travers' Petition constitutes.

Travers attempts to impute to Jones some personal investment in the outcome of the picket by characterizing the pay plan that was the subject of the picket as "Jones new pay plan." (Petitioner's Brief, p. 3). In fact, the pay plan that was being implemented arose from the steps taken by a prior administration. Jones and Chief Wilder submit that Travers is attempting to distract this Court from the proper application of the law by alleging inaccuarate, inflammatory and extraneous "facts."

In his statement of facts to this Court, Travers claims that he shouted out "Vernon, Vernon. . . . " as a preface to the "familiar refrain" used on the picket line "Vernon, Vernon, what do we want? Equal pay for equal work. When do we want it? Now." (Petitioner's Brief, pp. 2-3). However, this account differs from Travers' sworn deposition testimony before the District Court. In the District Court's order on summary judgment, that court said "the plaintiff states that he attempted to draw attention to the picket by twice calling his name 'Vernon, Vernon.'" (Petitioner's App. D, 13a). Travers, by now asserting that the words "Vernon, Vernon" were used in the context of a chant, is attempting to narrow any perceived gap between his conduct and the exercise of First Amendment rights. Travers is attempting to change the facts before this Court by adding testimony that was not part of the evidence before either the District Court or the Eleventh Circuit.

CONCLUSION

WHEREFORE, because the Eleventh Circuit has properly interpreted the law and this Court's precedent, Respondents pray that this Court DECLINE to grant certiorari to review the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Appeal No: 02-14043-I

DEKALB COUNTY, GEORGIA, VERNON JONES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHIEF EXECUTIVE OFFICER OF DEKALB COUNTY, GEORGIA; AND **SCOTT B. WILDER,** INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS FIRE CHIEF OF DEKALB COUNTY, GEORGIA,

Defendants/Appellant

v.

JAMES J. TRAVERS,

Plaintiff/Appellee

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
CASE NO. 1:01-CV-1734-RLV

AMENDED PETITION FOR REHEARING AND
REHEARING EN BANC ON BEHALF OF THE APPELLEE

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IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

DEKALB COUNTY, GEORGIA, VERNON JONES, Individually and in his Official Capacity as Chief Executive Officer of DeKalb County, Georgia; and **SCOTT B. WILDER**, Individually and in his Official Capacity as Fire Chief of DeKalb County, Georgia Defendants-Appellants, vs. **JAMES J. TRAVERS**, Plaintiff-Appellee.	**Appeal No.: 02-14043-I**

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Federal Rule of Appellate Procedure 26.1 and 28(a), and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, the undersigned attorneys for the Appellee certify that the following persons and/or organizations have an interest in the outcome of this appeal:

1. DeKalb County, Georgia (Defendant-Appellant)
2. Charles G. Hicks (Attorney for Defendants-Appellants)
3. Vernon Jones (Defendant-Appellant)
4. William J. Linkous, III (Attorney for Defendants-Appellants)
5. William J. Atkins (Attorney for Plaintiff-Appellee)

6. Parks, Chesin & Walbert, P.C. (Attorneys for Plaintiff-Appellee)
7. A. Lee Parks (Attorney for Plaintiff-Appellee)
8. E. Charles Reed, Jr. (Attorney for Defendants-Appellants)
9. James J. Travers (Plaintiff-Appellee)
10. Honorable Robert L. Vinings (United States District Court Judge for the Northern District of Georgia)
11. Scott Wilder (Defendant-Appellant)
12. Melanie F. Wilson (Attorney for Defendants-Appellants)

STATEMENT REGARDING EN BANC CONSIDERATION

I express a belief, based on a reasoned and studied professional judgement, that the panel decision is contrary to the following decisions of the Supreme Court of the United States, precedents of this Circuit, and precedents of Georgia's appellate courts, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in the Court:

U.S. v. Utah Construction & Mining Co., 384 U.S. 394, 86 S.Ct. 1545 (1966);

University of Tennessee et al v. Elliot, 478 U.S. 788, 106 S. Ct. 3220 (1986);

Carlisle v. Phoenix City Board of Education, 849 F. 2d 1376 (11th Cir. 1988);

Gjellum v. City of Birmingham et al, 829 F.2d 1056 (11th Cir. 1987);

Thornquest et al v. King et al, 82 F.3d 1001 (11th Cir. 1996);

Flournoy v. Akridge et al, 198 Ga. App. 86, 400 S.E.2d 649 (Ga. App. 1990).

I further express the belief, grounded in reasoned and studied professional judgement, that this appeal involves one or more questions of exceptional importance. The state of the law relating to the preclusive effect of unreviewed administrative decisions by municipal employers under Georgia law and its effect upon the continued viability of federal civil rights claims calls for an *en banc* decision reaffirming the rights of public employees to seek judicial review of constitutional violations by their public employers.

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Attorney of Record

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STATEMENT OF THE ISSUES

I. Whether the factual conclusions in an unreviewed decision of an administrative hearing officer affirming disciplinary action against an employee by his municipal employer have preclusive effect under Georgia law in a concurrent 42 U.S.C. § 1983 claim?

II. Whether a municipal employer's administrative hearing process for review of disciplinary actions against employees meets the standards set forth in *University of Tennessee et al v. Elliot, supra,* where the hearing officer is selected by a named defendant in the underlying lawsuit, no compulsory process exists, and the scope of evidence is limited to matters relevant to the disciplinary action?

STATEMENT OF THE CASE

Appellee James Travers', [hereinafter "Travers"], filed his Complaint on June 29, 2001. Defendant DeKalb County and Appellants Jones and Wilder timely filed their Answers and, following discovery, a joint motion for summary judgement on March 18, 2002. [RI-14]. The District Court denied DeKalb County and Appellants summary judgment on all grounds on June 18, 2002. [R3-33].

DeKalb County filed a motion for reconsideration of the denial of summary judgment to the County. That motion was denied in an order dated August 22, 2002 [R3-44]. The Defendants then sought a certificate of immediate review of all issues raised in their motions for summary judgement, which the District Court also denied on August 22, 2002. [R3-44].

Defendants Jones and Wilder then filed this interlocutory appeal challenging the District Court's denial of qualified immunity on summary judgement. In a per curiam opinion, a panel of this Court reversed the denial of qualified immunity. The Panel concluded that the District Court was bound by the factual determinations of a DeKalb County hearing officer, thus effectively denying Travers any meaningful opportunity to litigate his First Amendment retaliation claims under 42 U.S.C. § 1983.

STATEMENT OF THE FACTS

A. Introduction.

Appellee James Travers, [hereinafter "Travers"], is a firefighter. He works for the DeKalb County Fire Department. He has an impeccable professional reputation among his superiors and his peers. [R-20, Prickett Aff'd]. Other than the retaliatory disciplinary action at issue in this case, Travers has never been disciplined by any employer, much less the DeKalb County Fire Department. [R-15, Travers Depo.]. Travers filed this case to clear his name and remove an undeserved blemish from his otherwise untainted reputation. This Petition asks the Court to preserve the only real avenue of redress available to a public employee in Georgia who faces retaliation by a public employer – a civil rights action under 42 U.S.C.§ 1983 action.

B. Statement of Facts.

Travers became a member of the DeKalb Professional Firefighters Local 1492, the local chapter of the International Association of Firefighters ("IAFF), shortly after starting his employment with DeKalb County, [R-15,

Travers Depo]. By the time the events at issue in this case came to pass, Travers held the positions of trustee for the Union. [R-15, Travers Depo.]. As a trustee, Travers conducted political action, including protests, for the Union.

In 2001, DeKalb County implemented a new pay classification system that resulted in gross pay disparities between the various ranks within the Fire Department. Under the new plan, many long term employees with higher ranks and more years of service were paid less than employees with lower ranks and less tenure. Members of the Union, including Travers, initiated a protest over the inequities in the new pay system in early Spring, 2001.

On May 14, 2001, Travers was participating in a peaceful protest of the pay system outside the Manual Maloof Administration Building in DeKalb County. Travers was holding a picket sign that read, "Equal Pay For Equal Work"/"Honk For Firefighters". [R-15, Travers Depo]. During the protest, Travers observed Defendant Jones by his first name. [R-15, Travers Depo]. Jones heard Travers call his name and became visibly angry. He turned to confront Travers and openly threatened him. Jones told Travers that he had no business being out picketing and that he was being an "insubordinate" employee. [R-15, Travers Depo; R-25, Karabeika Depo; R-20, Okonkwo Aff'd].

Appellant Scott Wilder, [hereinafter "Wilder"] is the DeKalb County Fire Chief. On May 17, 2001, Wilder suspended Travers for thirty (30) days without pay based on allegations of "Insubordination" and "Conduct Unbecoming On/Off Duty" based on a complaint from Jones' office, and that of other county administrators who were

accompanying Jones at the time of his confrontation with Travers.

On June 29, 2001, Travers filed the instant suit in District Court against DeKalb County, Jones and Wilder for violation of his constitutional rights under the First Amendment. [R-1]. *Four months* after Travers filed this lawsuit, an administrative hearing officer "selected from the Hearing Officer pool *established by the Chief Executive Officer*" convened a hearing to hear Travers' appeal of Wilder's disciplinary action. By rule, the Hearing officer is not bound by "strict courtroom procedures as is normal for a judicial hearing." The presentation of evidence is limited to matters relevant to the disciplinary action taken against the employee. The Department maintains the right to open and conclude the proceedings. At the request of the parties, the Merit System Director may notify only County employees that a party has requested their attendance as witnesses, but no witness may be compelled to attend the hearing. [R-20, Ex.B].

At the hearing, Travers was only able to offer his own testimony to rebut the representations of the Department's witnesses. The administrative hearing officer made the following findings regarding the exchange between Travers and Jones: As CEO Jones exited the building, Travers turned to him and repeatedly changed Jones's first name in a "loudly, menacing and taunting manner." CEO Jones approached Travers and asked whether he was a County employee. Travers acknowledged that he was a County employee exercising his rights as a citizen. CEO Jones told Travers that while he did not mind that Travers was exercising his rights, he would not tolerate Travers' insubordinate actions. Travers then said that he needed to take off his sunglasses so that he could look into CEO

Jones' eyes. CEO Jones repeated that he would not tolerate Travers' insubordinate actions and walked away. The hearing officer found that his findings did not indicate any non-job related factor or any errors of fact that would warrant reversal of the disciplinary action. [R-20, Ex. A, G, I].

As the District Court recognized, and as the panel of the Court noted, "there was a sharp conflict between the plaintiff and the defendants as to what transpired at that time. The district court properly determined that the merits of the case turn on whether the plaintiff's or the defendants' version of the facts is correct." The panel of the Court then concluded that Travers' was precluded from relitigating the factual determinations made by the administrative hearing officer and reversed the decision of the District Court. Travers now respectfully requests that the Court reconsider its determination in light of conflicting precedent and the grave consequences of its holding to civil rights litigation in the context of public employment.

ARGUMENT AND CITATION OF AUTHORITY

I. THE PANEL FAILED TO APPLY GEORGIA LAW GOVERNING THE PRECLUSIVE EFFECT OF THE FACTUAL CONCLUSIONS IN AN UNREVIEWED DECISION OF AN ADMINISTRATIVE HEARING OFFICER AFFIRMING DISCIPLINARY ACTION AGAINST AN EMPLOYEE BY HIS MUNICIPAL EMPLOYER.

The Panel, and preferably the Court *en banc,* should reconsider its decision at issue here because that decision failed to apply Georgia law governing the preclusive effect of factual findings reached by an administrative hearing officer in the context of public employment. The Panel

erroneously concluded that "[u]nder Georgia law, once an administrative body rules on questions of fact, the questions of fact are thereafter precluded from re-litigation." In fact, Georgia law differs according to the nature of the administrative body in questions and the procedural safeguards that exist at the administrative level to insure due process. As a result, the Panel's holding incorrectly turns on a erroneous conclusion of law critical to the outcome of this proceeding.

The controlling Georgia authority in cases involving an administrative hearing of a disciplinary action by a public employer instances is *Flournoy v. Akridge* et al, 198 Ga. App. 86, 400 S.E. 2d 649 (Ga. App. 1990). The Court of Appeals held that "the factfinding process in a Section 1983 action is unique to the cause of actions such that the appellant did not have the opportunity to litigate necessary facts and issues to that claim in an administrative hearing geared toward an entirely separate cause of action," namely, an administrative review of his termination by the Department of Community Affairs. *Flourney*, 198 Ga. App. at 88. The Court specifically considered the Supreme Court's decision in *Univeristy of Tennessee v. Elliot*, *supra*, and determined that its decision was not in conflict with that authority. As the facts in *Flourney* are directly on point here, the Court should reconsider its decision and conclude that the factual determinations of an administrative hearing officer in the context of an

employment decision should not have preclusive effect on a subsequent 42 U.S.C. § 1983 action.[1]

The Court should also reconsider the holding of the Panel for reasons of judicial economy. Travers filed this lawsuit four months before the administrative hearing. The logical effect of the Court's decision here is to prevent other plaintiffs, such as Travers, from using a concurrent administrative procedure that may afford a solution that reduces the need for federal litigation. Travers is being punished for seeking redress with his employer, even as he proceeded with this litigation. This Court recognized the value of encouraging multiple avenues of resolution in *Gjellum v. City of Birmingham et al*, *supra*, when the Court refused to extend *Elliot's* holding to "claim preclusion."

> [w]e conclude that the importance of the federal rights at issue, the ***desirability of avoiding the forcing of litigants to file suit initially in federal court rather than seek relief in an unreviewed administrative proceeding*** and the limitations of state agencies as adjudicators of federal rights override the lessened federalism concerns implicated outside the contours of the full faith and credit statute.

---

[1] At a minimum, the Court of Appeal's decision in *Flourney*, conflicts with a recent decision of a different panel of the Georgia appellate court in *Jordan v. Board of Public Safety*, 253 Ga. App. 339, 559 S.E.2d 94 (Ga. App. 2002) cited by the Panel of this Court in its opinion. Counsel notes with regret, that due to excusable neglect, counsel failed to cite to the *Flourney* decision in Travers' initial Brief to the Court, despite having relied heavily on *Flourney* in Travers' Brief in Opposition to Summary Judgment.

Gjellum, supra at 1064. In the context of public sector employment discrimination, permitting "issue preclusion" on a critical issue of fact in a First Amendment case, i.e. the nature of the employee's speech, is tantamount to claim preclusion. Therefore, the Panel and the Court should reconsider application of issue preclusion in its decision granting qualified immunity to the defendants.

II. A MUNICIPAL EMPLOYER'S ADMINISTRATIVE HEARING PROCESS FOR REVIEW OF DISCIPLINARY ACTIONS FAILS TO MEET THE STANDARDS SET FORTH BY THE SUPREME COURT IN *UNIVERSITY OF TENNESSEE ET AL V. ELLIOT*.

In *University of Tennessee et al v. Elliot*, *supra*, the Supreme Court held that "[w]hen and administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency's fact-finding the same preclusive effect to which it would entitled in the State's courts." The Panel erroneously concluded that the administrative hearing at issue in this case met the standard set forth by the Supreme Court in *Elliot*.

In doing so, the Panel relied on authority from outside this Circuit to conclude that employees are not entitled to compulsory process in an administrative hearing. Although that conclusion does not run afoul of any direct precedent in this Circuit, Travers respectfully submits that the decision is inconsistent with the Court's prior holdings in *Thornquest v. King*, 82 F.3d 1001 (11th Cir. 1996) and *Carlisle v. Phoenix City Board of Education*, 849 F.2d 1376 (11th Cir. 1988). The logical effect of the Court's

holding is to grant "claim preclusion" by allowing issue preclusion as to a critical element of Travers' underlying First Amendment claim. It is undisputed that Travers' First Amendment claim was not at issue before the administrative hearing officer; the only issue there was his conduct during the altercation with Appellant Jones. Much as in *Carlisle*, collateral estoppel should not apply to effectively end a employment discrimination claim because of a narrow, but critical, factual finding by an administrative body.

CONCLUSION

For the within and foregoing reasons, the Court should grant Travers' Petition and allow for rehearing *en banc*.

This ___ day of April, 2003.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party with a copy of the within and foregoing Amended Petition for Rehearing and Rehearing En Banc on Behalf of the Appellee by depositing a copy of

the same in the United States mail, postage prepaid, addressed as follows:

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This ___ April, 2003.

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